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CASE NUMBER: 2019CV31577

DISTRICT COURT, DENVER COUNTY, COLORADO
1437 BANNOCK STREET
DENVER, COLORADO 80202

Plaintiff:

DEFEND COLORADO, a Colorado nonprofit association

v.

Defendants:

GOVERNOR JARED POLIS and THE COLORADO AIR
QUALITY CONTROL COMMISSION.

↑ COURT USE ONLY ↑

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Division: Courtroom: 203

AFFIDAVIT OF KATHERINE KENNEDY

The Affiant, Katherine Kennedy, being duly sworn, hereby affirms that the statements contained herein are based upon personal knowledge and, if called as a witness, will testify to the same.

1. My name is Katherine Kennedy.

2. I am of legal age and I am competent to testify as to the facts set forth herein based on my personal knowledge and my status as a member and the Director of Defend Colorado.

3. Defend Colorado is registered in Colorado as a nonprofit corporation under section 501(c)(4) of the Internal Revenue Code.

4. Defend Colorado's members include Colorado citizens and businesses that live and operate in the state of Colorado, whom are classified as air emissions sources under Colorado's Air Pollution Prevention and Control Act ("Colorado Air Act") and the federal Clean Air Act, and whom are subject to regulatory and permitting requirements under the same.

5. Defend Colorado's Mission Statement, as codified in its bylaws, is:

To research, study, and engage on government policies, laws, and regulations in the State of Colorado to ensure that those government actions comply with and adhere to the Colorado Revised Statutes and Colorado Constitution and are based on reasonable, justifiable policy decisions that place a priority on facts and science and balance the costs of those policies, laws, and regulations with their intended benefits. To oppose and challenge unlawful, unnecessary, unsubstantiated, and unreasonable government policies, laws, and regulations that harm Colorado citizens and businesses. As part of Defend Colorado's social welfare purpose, the organization will take direct actions including petitioning and challenging government actions that are contrary to the goals in this mission statement.

6. One of Defend Colorado's core functions is therefore to participate in regulatory agency proceedings in Colorado, including petitions for rulemakings, on behalf of its members, and to advocate for those members' interests during those regulatory proceedings.

7. Another of Defend Colorado's core functions is to ensure that Colorado's elected officials and administrative agencies, such as Governor Polis and the Colorado Air Quality Control Commission ("Commission"), adhere to the Colorado Revised Statutes and Colorado Constitution.

8. As a part of Defend Colorado's ongoing efforts to execute its Mission Statement, Defend Colorado routinely communicated with its members to assess current actions regarding

policies, laws, or regulations in front of state agencies, officials, and lawmakers that could harm those members.

9. Through these communications Defend Colorado became aware that Colorado was facing a potential downgrade of the Denver Metro / North Front Range Areas designation status to a Serious Nonattainment Area for ozone (pursuant to 42 U.S.C. § 7407 and 7511 of the Clean Air Act) for the 2008 National Ambient Air Quality Standards (“NAAQS”), which would have a significant effect on Colorado citizens and businesses.

10. Defend Colorado further became aware that a downgrade in the Denver Metro / North Front Range Area’s attainment status will cause significant harm to Defend Colorado and its members.

11. Defend Colorado therefore determined that it was consistent with its Mission Statement to closely follow any actions taken by Colorado that could affect the Denver Metro / North Front Range Area’s attainment status.

12. Defend Colorado extensively reviewed the administrative and statutory processes under the Clean Air Act and Colorado Air Pollution Prevention and Control Act (“Colorado Air Act”) governing Colorado’s certification to the U.S. Environmental Protection Agency (“EPA”) of Colorado’s current attainment status for achieving the 2008 ozone NAAQS.

13. From this review Defend Colorado became aware that the Commission is the exclusive agency under the Colorado Air Act in charge of administering Colorado’s air quality control obligations under the Clean Air Act, including any annual certification of air quality data to EPA, and any demonstrations or requests to EPA, such as extension requests.

14. Defend Colorado also became aware that the Commission is required accurately certify Colorado's air emissions data to EPA, and thus Colorado's 2008 ozone NAAQS attainment status to EPA, based on an accurate air emissions inventory that accounts for current science and facts.

15. Defend Colorado further became aware that an accurate air emissions inventory that accounts for current science and facts will unequivocally show that international emissions and exceptional events are materially and significantly effect ozone concentrations in Colorado to the point that but for those emissions, Colorado, and the Denver Metro / North Front Range Area in particular, would be in attainment with the 2008 ozone NAAQS.

16. Defend Colorado also became aware that the Clean Air Act specifically authorizes states to make international emissions and exceptional events demonstrations that will allow the state to avoid a nonattainment designation (and the harmful effects of that designation) if international emissions and exceptional events are the but for cause of that state's nonattainment.

17. Finally, Defend Colorado concluded that any actions that will affect Colorado's NAAQS attainment status under the Clean Air Act must first be subject to a public hearing as statutorily required by the Colorado Air Act.

18. In light of Defend Colorado's statutory review, and due to the potential harm to Defend Colorado, its members, and Colorado citizens that would result from a Serious Nonattainment Area designation for the 2008 ozone NAAQS, Defend Colorado closely monitored the Commission's activities surrounding its annual certifications of Colorado's air emissions data to EPA.

19. Defend Colorado became aware that the Commission had not been complying with its statutory duty to act as the state agency for all purposes of Colorado's Clean Air Act obligations, instead allowing the Colorado Department of Public Health and Environment ("CDPHE") to administer Colorado's obligations, including Colorado's annual certification of air emissions data to EPA.

20. Defend Colorado further became aware that neither the Commission or CDPHE planned to include an accurate accounting of international emissions and exceptional events in Colorado's 2019 annual certification to EPA, and did not have any current plans to make an international emissions or exceptional events demonstration to EPA as allowed by the Clean Air Act.

21. Defend Colorado therefore submitted its Petition for Expedited Public Hearing and Request for Declaratory Order ("Petition") to the Commission, seeking that the Commission comply with the Colorado Revised Statutes and Colorado Constitution by holding a public hearing to examine the effects of international emissions and exceptional events on ozone concentrations in Colorado, and to, if supported by the results of the public hearing, to include demonstrations of how international emissions and exceptional events were affecting Colorado's ability to attain current ozone NAAQS.

22. Defend Colorado also hired an external engineering consultant, Ramboll USA, Inc. ("Ramboll"), to independently assess Colorado's air emissions data to determine if international emissions and exceptional events were materially affecting Colorado's ability to comply with current ozone NAAQS.

23. Initial analysis by Ramboll indicated that international emissions and exceptional events were materially and significantly affecting Colorado's ability to comply with current ozone NAAQS, and were likely a "but for" cause of Colorado's failure to attain those ozone NAAQS.

24. Further, EPA guidance material reviewed by Ramboll during its analysis showed that EPA specifically allowed for states to flag their annual air quality data for international emissions and exceptional events when submitting their annual certifications, which are required to be certified as accurate and complete to the best of the state's knowledge.

25. Defend Colorado participated directly in all aspects of the Commission's consideration of its Petition, including responding to opposition to the Petition filed by the Colorado Air Pollution Control Division ("Division"), preparing presentations for the Commission, and coordinating with Ramboll to present on unbiased scientific facts on Colorado's air emissions data and inventory relevant to the Petition.

26. Defend Colorado also participated directly in the Commission's meeting to consider the Petition, presenting on the legal basis for the Petition, and having a Ramboll representative present on the objective science behind the Petition.

27. Defend Colorado was further prepared to participate in any eventual public hearing on its Petition, including presenting on the legal requirements for Colorado's annual air monitoring data certification to EPA, including the effects of international emissions and exceptional events on ozone concentrations in Colorado, with a concurrent detailed presentation on the science and facts behind international emissions and exceptional events prepared by Ramboll.

28. Defend Colorado was also prepared to present on EPA's specific guidance allowing states to flag international emissions and exception events in their annual May 1 certifications to

EPA, and how that flagging ability related to the annual certification which is required to be accurate to the best of the state's knowledge.

29. Separate from its Petition, Defend Colorado closely followed CDPHE's June 4, 2018 request to EPA to extend Colorado's deadline to comply with current NAAQS for ozone in the Denver Metro / North Front Range Area by one year.

30. Defend Colorado personally participated in the EPA's consideration of Colorado's extension request. EPA's published a proposed rule on November 14, 2018, which proposed to grant Colorado's extension request. Defend Colorado commented in support of EPA's proposed rule on December 14, 2018.

31. Defend Colorado also closely followed Governor Polis' unilateral March 26, 2019 letter claiming to withdraw Colorado's June 4, 2018 extension request to EPA ("Withdrawal Letter").

32. Defend Colorado concluded that the Governor's Withdrawal Letter was a violation of the separation of powers required by the Colorado Constitution by usurping the Commission's role as the sole state agency for purposes of the Clean Air Act.

33. Because the Withdrawal Letter was unlawful, it was consistent with Defend Colorado's organization purpose to challenge the Governor's actions in unilaterally issuing the letter.

34. As the Director of Defend Colorado, I personally oversaw Defend Colorado's preparation and participation in its Petition, in Defend Colorado's participation in issues relating to Colorado's 2018 attainment date extension request to EPA, and in Defend Colorado's decision

to bring this action challenging the Commission's and the Governor's actions under the Colorado Revised Statutes and Colorado Constitution.

35. Defend Colorado, and its members, are significantly harmed by the Commission's refusal to rule on its Petition, as well as by Governor Polis' interference in the Commission's decision and issuance of the Withdrawal Letter.

36. The Commission's refusal to rule on the Petition harms Defend Colorado and its members by denying them their statutory right to participate in a public hearing on Colorado's annual certification of its air quality data and NAAQS attainment status to EPA.

37. The Commission's refusal to rule on the Petition also harms Defend Colorado and its members by denying them their statutory right to participate in a public hearing held to develop an accurate accounting of Colorado's air emissions inventory, including whether international emissions and exceptional events are affecting Colorado's air quality data and should be included in annual certifications to EPA.

38. Governor Polis interference in the Commission's consideration of Defend Colorado's Petition by directing the Division not to examine the effects of international emissions and exceptional events in Colorado harms Defend Colorado and its members by violating the separation of powers required by the Colorado Constitution.

39. The Commission's refusal to rule on the Petition may also Defend Colorado and its members by resulting in a Serious Nonattainment Area designation for the Denver Metro / North Front Range Area which would impose harmful regulatory oversight and permitting requirements on Defend Colorado and its members, Colorado's citizens, businesses, and all "sources" of air emissions for decades:

- a. This includes a reduction in the threshold that emissions sources are now subject to Title V permitting, from 100 tons per year (tpy) of expected ozone emissions to 50 tpy. Title V permitting requirements are more burdensome, costly, and time consuming than the permitting requirements for emissions sources not covered by Title V.
- b. Further, Defend Colorado's members which are classified as "new" or "modified" (*i.e.*, expanding) "major sources" will face stringent preconstruction permitting requirements. Such Colorado "sources" would have to offset any increase in their ozone precursor emissions at a ratio of 1.2 to 1.0. These additional and more stringent permitting requirements will impose additional costs on Colorado businesses, discouraging the formation of new businesses, or the expansion of those already existing. This will send jobs out of the area, decrease opportunities for Coloradans who live in the area, and increase costs for Colorado's consumers.
- c. Finally, Defend Colorado members classified as emissions sources already emitting over 100 tpy of ozone precursors also would be subject to more stringent regulatory requirements, such as a requirement to achieve lowest achievable emission rates when that source is modified. These requirements are onerous and time consuming and drive up costs

40. Defend Colorado and its members are separately harmed by Governor Polis' Withdrawal Letter to EPA, which violated the separation of powers required by the Colorado Constitution by unlawfully usurping the Commission's role as the state agency for all purposes of

the Colorado Air Act, including the Commission's responsibilities for submitting or withdrawing any attainment date extension requests to EPA.

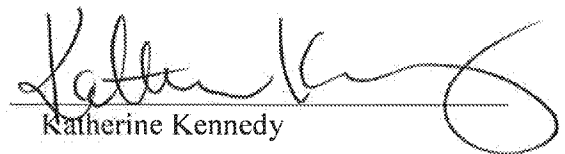
41. Defend Colorado and its members are also harmed by the Governor's Withdrawal Letter because the unilateral issuance of that letter has denied Defend Colorado and its members their statutory right under the Colorado Air Act to participate in the public hearing required before the Commission takes actions affecting Colorado's air pollution control regulatory programs and policies and Colorado's attainment status.

42. Governor Polis' withdrawal letter will separately result in a Serious Nonattainment Area designation for the Denver Metro / North Front Range Area which will impose harmful regulatory oversight and permitting requirements on Defend Colorado and its members for the same reasons discussed above.

43. Finally, Defend Colorado collects membership dues from its members which enables it to carry out its Mission Statement and advocate on behalf of its members. Economic injury to its members as a result of a Serious Nonattainment Area designation may reduce Defend Colorado's membership revenues and therefore its ability to effectively carry out its Mission Statement and advocacy goals.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge.

Executed on this 14 day of June, 2019.


Katherine Kennedy

State of Colorado)
County of Denver) s.s.

Subscribed and sworn to (or affirmed to) before me in the county of Denver
State of Colorado, this 6th day of June, 2019.

[Signature]
(Notary's official Signature)

3/31/21
(Commission Expiration)

